

PRELIMINARY INSTRUCTIONS

Introductory Note to the Judge

The following is a guide for preliminary instructions in a criminal case. They are designed to provide a framework for a trial judge to select appropriate charges. The decision as to when to use particular instructions is left to the sound discretion of the trial judge. Some of these instructions could be used during the trial as well as, or instead of, in the preliminary instructions. The responsibility of implementing the applicable law falls squarely on the trial judge. Thus, the instructions that follow are, in effect, “model,” or “sample,” charges.

The Criminal Procedure Law requires that “[t]he court must deliver preliminary instructions to the jury” [CPL 260.30], but provides little guidance on the requirements of preliminary instructions. It specifies:

“After the jury has been sworn and before the people's opening address, the court must instruct the jury generally concerning its basic functions, duties and conduct.” CPL 270.40

The statute thereafter mandates only that certain admonitions be given the jury:

“Such instructions must include, among other matters, admonitions that the jurors may not converse among themselves or with anyone else upon any subject connected with the trial; that they may not read or listen to any accounts or discussions of the case reported by newspapers or other news media; that they may not visit or view the premises or place where the offense

or offenses charged were allegedly committed or any other premises or place involved in the case; that prior to discharge, they may not request, accept, agree to accept, or discuss with any person receiving or accepting, any payment or benefit in consideration for supplying any information concerning the trial; and that they must promptly report to the court any incident within their knowledge involving an attempt by any person improperly to influence any member of the jury.” CPL 270.40.

The Court of Appeals has added some guidance on the purpose and content of preliminary instructions. Thus, in People v. Newman, 46 N.Y.2d 126, 128-130 (1978), the Court explained:

“It is well and good for Trial Judges to give jurors the benefit of an introductory and explanatory address to help dissipate some of the mystery that may lurk in laypersons who are about to undertake the responsibilities of playing a significant and determinative, albeit transient, role in the adjudicative process. It is also more than helpful, and in some cases essential, that jurors be familiarized with pertinent rules and procedures peculiar to the law and the courts and perhaps the particular matter at hand. Every Judge who has had to preside over a jury trial and every lawyer who has ever prepared or tried such a case appreciates the advantages of such indoctrination in easing the transition jurors must make as they move from their usual occupational environments into the world of law.”

The American Bar Association Principles for Juries & Jury Trials has echoed Newman:

“The court should give preliminary instructions directly following empanelment of the jury that explain the jury’s role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.” Principle 6 -C-1.

Thus, preliminary instructions should cover the statutory requirements, set forth the basic and important legal principles that a jury needs to know, attempt to explain to jurors things they will see and hear during a trial that might otherwise puzzle them, and try to assure jurors that rulings on objections and the rules that govern a trial are designed solely to assure that the trial will be orderly and fair, and not to hide relevant information.

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Introduction

Members of the jury, we are about to proceed with the trial of the case of the People v. _____.

At the outset, I am going to explain the various stages of a trial and what you may expect to see and hear during the trial so that you may better understand what is taking place. I will also remind you of some basic principles of law which apply to this and all criminal trials.

At the conclusion of the case, I will again remind of those principles. I will define the crime(s) charged, explain the law that applies to [that/those] charged crime(s), and list for you the elements that the People must prove beyond a reasonable doubt.

Remember, during jury selection, I explained that “elements of a charged crime” is a term that refers to the various parts of our law's written definition of the crime, in addition to the identification of a person as the one who committed that crime.

[Multiple Defendants]

Add if applicable:

There are (specify the number) defendants before you and we are thus conducting (specify the number) trials in one.

It is your obligation to evaluate the evidence as it applies, or fails to apply, to each defendant separately.

Each instruction on the law must be considered by you as referring to each defendant separately.

You must return a separate verdict for each defendant. And those verdicts may be, but need not be, the same.

It is your sworn duty to give separate consideration to the case of each individual defendant. ²

Explanation of the "Record"

As you can see, a court reporter is taking down everything that is being said. What he/she takes down is called the "record" of the trial.

Sometimes you will see a witness use his/her hands to illustrate something. For example, a witness may say that an object was "this long," using his hands to demonstrate. Normally, you will then hear the lawyer or the court say something like: "Let the record reflect that the witness is indicating about one foot."

We do that because sometimes it becomes necessary to have the court reporter read back what a witness says and what the witness was indicating. If someone does not state orally for the record what a witness is indicating with his or her hands, when that portion of the record is read back, we will not know what the witness was indicating.

You, of course, will be able to see what the witness is indicating, and make your own judgment.

Openings

The trial formally begins with what the law calls an opening statement by the prosecutor.

The law requires the prosecutor to make an opening statement.³

The law, however, does not require the defendant to make an opening statement.⁴ If the defendant does not make an opening statement, that is not a factor from which you may draw any inference unfavorable to him/her.

Remember, what the lawyers say in an opening statement or at any time thereafter is not evidence.⁵ The lawyers are not witnesses. What I say is not evidence. I am not a witness. In other words, you must decide the case on the evidence and what the lawyers say at any time is not evidence.

Presentation of Evidence

After completion of the opening statement(s), the prosecutor will proceed with the presentation of evidence.⁶

I remind you that the indictment is not evidence; it is simply a document that contains an accusation.⁷ The defendant has pled not guilty to (that/ those) accusation(s), and the trial is for you to hear the evidence and decide whether the defendant is guilty or not guilty.

I remind you also that evidence is the testimony of witnesses, the stipulations, if any, agreed to by the parties, and documents or other physical objects received in evidence.

1. Testimony is of course the most common form of evidence and comes from the questioning of the witnesses by the lawyers, and perhaps by the court, [but not by the jury].

A question by itself is not evidence. It is the question with the answer that is the evidence. For example, sometimes a question will assume something to be true. You are not, however, to conclude that an assumption in a question is true unless the answer, in your judgment, confirms that it is true. So, you must consider the question with the witness's answer, and decide whether you find the answer believable and accurate-because, again, it is the question with the answer that is the evidence.

2. Next, evidence may come in the form of a **stipulation**. A stipulation is information which both parties agree to present to the jury, as evidence, without calling a witness to testify to the information.

3. Last, evidence may come in the form of **physical objects**, such as: documents, photographs, clothing, or charts.

Exhibits

When a lawyer is questioning a witness and in a question refers to a physical object for the first time, the object is normally marked with a number or letter of the alphabet so we can more easily identify the object and refer to it. That procedure is very helpful in keeping track of physical objects.

It is the responsibility of the Court Reporter to physically write an exhibit number or letter on the object, or on a label that is then attached to the object. Sometimes, depending on the type of physical object, it may be too difficult or inconvenient to mark the object and the object is deemed marked rather than actually marked. It is the responsibility of the court personnel to keep an accurate listing of the exhibits.

Normally, when the object is first referred to, a lawyer will ask the court to have the object "marked for identification."

If the People make the request and the court grants the request, the object is deemed or marked with a number.

If the defendant makes the request and the court grants the request, the object is deemed or marked with a letter of the alphabet. That just helps us to remember who introduced the exhibit.

[Sometimes, to save time during the trial, I have certain physical objects deemed or marked for identification before the trial begins and you will then hear the lawyer refer to the object only by its number or letter.]

An item deemed or marked for identification is not evidence and is therefore not available for your inspection and consideration.

Sometimes a lawyer will ask the court to receive the object in evidence. When a lawyer does that, the other lawyer is at that moment permitted to ask the witness questions designed to determine whether the object can, under our law, be admitted in evidence. If I grant the request to admit the object in evidence, then the object becomes evidence, and is available for your inspection and consideration.⁸

If at the time a physical object is received in evidence, it is too small for all the jurors to see (like a small photograph), at a convenient moment, I will have the court officers show the object to you.

Further, if during your deliberations you wish to see an object received in evidence, you may do so by simply asking me to see the object.

-Refreshing a Witness's Recollection

An example of a document that may be marked for identification but not received in evidence is as follows:

Sometimes a witness will be asked a question and then answer that he or she cannot remember what is being asked for, but that he or she may be able to refresh his or her recollection or memory if given an opportunity to examine something, usually a document. The witness may then be given the document and permitted to read it silently to himself or herself. If that document refreshes the witness's recollection or memory, the witness will then answer the question, and the question with that answer is evidence.⁹

The document used to refresh the witness's recollection may or may not be marked for identification but in most instances that document will not be received in evidence and thus that document is not available for your inspection and consideration. But the question with the answer that the witness gave will be in evidence for your consideration.

Pre-trial Preparation and Exclusion of Witnesses

It is common and permissible for a lawyer [or an investigator for a lawyer] to speak to a witness about his or her testimony before calling him or her to the stand. ¹⁰

Also, a witness may review documents and other material pertaining to the case before he or she testifies at the trial.¹¹

Generally, a witness scheduled to testify at trial may not be present in the courtroom during the testimony of other witnesses.¹²

Defendant's Case

After the People have completed the presentation of their evidence, (each/the) defendant may, but is not required to, present evidence.¹³

Presumption of Innocence

I remind you that, throughout these proceedings, the defendant is presumed to be innocent.¹⁴ As a result, you must find the defendant **not** guilty, unless, on the evidence presented at this trial, you conclude that the People have proven the defendant guilty beyond a reasonable doubt.¹⁵

[Defendant Who Does Not Testify]

(Add only if the defendant requests it)

That a defendant does not testify as a witness is not a factor from which any inference unfavorable to the defendant may be drawn.]¹⁶

Burden of Proof

The defendant is not required to prove that he/she is not guilty.¹⁷ In fact, the defendant is not required to prove or disprove anything.¹⁸ To the contrary, the People have the burden of proving the defendant guilty beyond a reasonable doubt.¹⁹ That means, before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed that crime.²⁰ The burden of proof never shifts from the People to the defendant.²¹ If the People fail to satisfy their burden of proof, you must find the defendant not guilty.²² If the People satisfy their burden of proof, you must find the defendant guilty.

Burden of Proof

(in cases with an affirmative defense)

NOTE: If the defendant has not “committed” to interposing an affirmative defense or the defendant expects to interpose an affirmative defense but at the preliminary instructions stage, the jury will not be informed of the affirmative defense, the above standard instruction on reasonable doubt should be given.

The defendant is not required to prove or disprove any element of a charged crime.ⁱ To the contrary, the People have the burden of proving every element of a charged crime beyond a reasonable doubt.ⁱⁱ That means, before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime including that the defendant is the person who committed that crime.ⁱⁱⁱ The burden of proof never shifts from the People to the defendant.^{iv} If the People fail to satisfy their burden of proof, you must find the defendant not guilty.^v If the People satisfy their burden of proof of all of the elements of a crime, you^{vi} will then consider an affirmative defense, which I will explain shortly. First,

Reasonable Doubt

What does our law mean when it requires proof of guilt "beyond a reasonable doubt"?²³

The law uses the term, "proof beyond a reasonable doubt," to tell you how convincing the evidence of guilt must be to permit a verdict of guilty.²⁴ The law recognizes that, in dealing with human affairs, there are very few things in this world that we know with absolute certainty. Therefore, the law does not require the People to prove a defendant guilty beyond all possible doubt.²⁵ On the other hand, it is not sufficient to prove that the defendant is probably guilty.²⁶ In a criminal case, the proof of guilt must be stronger than that.²⁷ It must be beyond a reasonable doubt.²⁸

A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence.²⁹ It is an actual doubt, not an imaginary doubt.³⁰ It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence.³¹

Proof of guilt beyond a reasonable doubt is proof that leaves you so firmly convinced³² of the defendant's guilt that you have no reasonable doubt of the existence of any element of the crime or of the defendant's identity as the person who committed the crime.³³

In determining whether or not the People have proven the defendant's guilt beyond a reasonable doubt, you should be guided solely by a full and fair evaluation of the evidence. After carefully evaluating the evidence, each of you must decide whether or not that evidence convinces you beyond a reasonable doubt of the defendant's guilt.

Whatever your verdict may be, it must not rest upon baseless speculations.³⁴ Nor may it be influenced in any way by bias, prejudice, sympathy, or by a desire to bring an end to your deliberations or to avoid an unpleasant duty.³⁵

If you are **not** convinced beyond a reasonable doubt that the defendant is guilty of a charged crime, you must find the defendant not guilty of that crime. If you are convinced beyond a reasonable doubt that the defendant is guilty of a charged crime, you must find the defendant guilty of that crime.³⁶

Examination of witnesses

Now, each witness, by whomever called, is first examined, that is, asked questions, by the lawyer who calls the witness to testify. That is called direct examination.

When the direct examination is completed, the other lawyer is permitted to ask questions of the witness. That is called cross examination.

You may then have re-direct examination and re-cross examination, but under our law, the scope of such additional examinations is limited on the theory that the lawyers had sufficient opportunity on their original direct or cross to ask whatever they wanted.³⁷

Juror Questions

(Select applicable alternative)

Not Permitted

The lawyers are responsible for questioning the witnesses. The Court may at times ask a witness a question. Jurors may not ask questions of a witness.

Permitted³⁸

The lawyers are responsible for questioning the witnesses. The Court may at times ask a witness a question.

Jurors, as we have discussed, are responsible for listening carefully to all the testimony and other evidence and rendering a fair verdict based on the evidence presented to them. Thus, jurors do not regularly question witnesses. In a rare instance, a juror may, however, wish to ask a question which will clarify in the juror's mind something the witness testified to. A clarifying question by a juror is permitted pursuant to the following rules.

First, because you will often find that a question which you would like to ask is eventually asked by a lawyer, please do not write a question down while the lawyers are questioning the witness. When the lawyers are finished questioning a witness and before the witness is excused, I will supply you with paper to write, if you wish, a question for the witness. Please, do not write your name on the paper, and do not feel compelled to write a question, and do not at any time discuss with a fellow juror or anyone else whether to ask a question.

Second, if you do write a question, the question should be designed to obtain relevant information, usually of a clarifying nature. Your questions should not, directly or indirectly, express your opinion of the witness or the case, or seek to argue with the witness. Nor are you to assume the role of investigator or advocate. You are the impartial finders of fact and your questions therefore should be neutral in tone and substance and limited to clarifying something which a witness has testified to. Again, please do not feel compelled to write a question. A question from a juror should be the exception, not the rule.

Third, your question will be subject to the same rules of evidence that a question of a lawyer is subject to. I will thus review your written question with the lawyers and decide whether or not to authorize the question as written or in substance in a legally permissible form. I will ask the witness any authorized question.

If your question is not asked, or is asked in a different form, please do not be offended, do not speculate as to why the question was not asked, or as to what the answer would have been, and do not take any unfavorable inference against the People or a/the defendant. After the witness has answered your question, the lawyers will be permitted to ask any relevant follow-up questions.

Juror Note-taking Permitted

Note: The following instruction authorizes the jury to take notes. If the court decides to instruct the jury to not take notes, an appropriate charge is set forth in the endnote to this Note. ³⁹

You may, but are not required to, take notes of (*specify, e.g. the testimony of the witnesses*).⁴⁰ If you wish to take notes, we will provide materials to you for that purpose. If you decide to take notes, you must follow these rules:

Remember, every word of each witness is recorded by the Court Reporter and, during deliberations, upon your request, the testimony will be read back to you in whole or in part. So there is no need to take verbatim notes of a witness's testimony. Notes, by definition, are a "brief" written record of something to assist the memory. A note should not take precedence over your own independent recollection.

Remember also, you are the finders of fact who are responsible for evaluating the believability and accuracy of a witness's testimony; it is thus important that you be able to both fully comprehend what a witness is saying and how the witness is saying it. Accordingly, you must not permit note-taking to distract you from the proceedings. If you make a note, it should be brief and not distract you from what the next question and answer is.

Any notes a juror takes are only for that juror's own personal use in refreshing his or her recollection. Thus, jurors who choose not to take notes must rely on their own independent recollection, and must not be influenced by any notes that another juror may take.

Also, a juror's notes are not a substitute for the recorded transcript of the testimony or for any exhibit received in evidence. If during your deliberations, there is a discrepancy between a juror's recollection and his or her notes regarding the evidence, you should ask to have the relevant testimony read back or the exhibit produced for your inspection.

[Add if note-taking of the Court instructions is permitted:

In addition, a juror's notes are not a substitute for the detailed explanation I will give you of the principles of law that govern this case. If there is a discrepancy between a juror's recollection and his or her notes regarding those principles, you should ask me to explain those principles again, and I will be happy to do so.]

Each juror who intends to take notes shall print his or her (name or other identifier) on (specify). At the end of each trial day until the jury retires to deliberate, the notes will be collected from each juror who takes notes. A juror may only refer to his or her notes during the proceedings and during deliberations. Any notes taken are confidential and shall not be available for examination or review by any party or other person. After the jury has rendered its verdict, we will collect the notes and destroy them.

Credibility of Witness

As judges of the facts, you alone determine the truthfulness and accuracy of the testimony of each witness. You must decide whether a witness told the truth and was accurate, or instead, testified falsely or was mistaken. You must also decide what importance to give to the testimony you accept as truthful and accurate. It is the quality of the testimony that is controlling, not the number of witnesses who testify.⁴¹

Test of Credibility

There is no particular formula for evaluating the truthfulness and accuracy of another person's statements or testimony. You bring to this process all of your varied experiences. In life, you frequently decide the truthfulness and accuracy of statements made to you by other people. The same factors used to make those decisions, should be used in this case when evaluating the testimony. At the end of the trial, I will give you some examples of those factors.

Court Rulings

There are, as I am sure you appreciate, rules for all stages of a trial, including rules that govern whether certain evidence may be introduced and, if so, how and when. Part of my job is to enforce those rules.

Some of these rules you may understand when you hear the ruling, but some of them you may not understand unless you have studied the law. The rules have been carefully developed over hundreds of years for the sole purpose of guaranteeing a fair and orderly trial.

In other words, the rules are not designed to determine whether the evidence you hear and see is true or false, accurate or inaccurate. It is for you, not me, to evaluate the evidence and make that decision. The rules are designed to ensure that the evidence you hear and see is relevant and in a form that permits you to evaluate it fairly.

[One of these rules, dealing with refreshing a witness's recollection or memory, I have already explained to you.] I am now going to explain some [other] rules that are commonly applied during a trial so you will better understand the court's ruling when it is made, and you will appreciate, as I just explained, that the rules are designed only to assure a fair and orderly trial.

Permissible Testimony

-Personal knowledge

A witness usually can testify only about matters the witness has personal knowledge of, that is, something the witness has personally seen, heard, felt, touched, or tasted. Thus, a witness is not permitted to guess, or speculate or say what he or she thinks another person saw, heard, felt, touched, or taste.

Also, a witness is not permitted to give an opinion about matters for which a special expertise is necessary, unless, of course, the witness purports to be an expert on the matter he or she is being questioned about.

With some exceptions, what a witness may have been thinking when something was taking place is not relevant evidence.

Finally, a witness is often not permitted to testify to “hearsay” -meaning generally that a witness can not testify to what the witness may have said before the trial, or what another person may have said to that witness.⁴² But, there are many exceptions to the “hearsay” rule, for a variety of sound reasons, too numerous to detail for you now. I will, however, explain a couple of exceptions that frequently arise during a trial.

-Statement not admitted for its truth

Sometimes a witness will be permitted to testify that the witness did something because of what someone said.

In that circumstance, it does not matter who uttered the statement, or how the speaker gathered the information for the statement, or even whether the statement is truthful and accurate. It matters only that someone uttered words and the witness did something on hearing those words.

So, in that instance, you may not consider what the witness was told for the truth of the words said to the witness. You may consider the words only for the reason they are offered, that is, to explain what the witness did after hearing the statement.

-Prior Statement of a Witness

In limited circumstances, our law permits a witness to be asked whether that witness made a statement about the case before testifying at the trial.

If such a question is permitted, the law requires that the questioner inform the witness of the time, date, place and content of the prior statement in order to permit the witness an opportunity to recall whether he or she made that prior statement.⁴³ I'm sure you find that to be fair.

If the statement were allegedly made in a legal proceeding and there is a transcript of that proceeding, the law requires that after questions establishing the time, date, and place, the questioner ask the witness whether he or she was asked the following question and gave the following answer, and then the lawyer will read the purported question and answer and the witness should say yes or no.

Unless you are told otherwise, you can accept that the lawyer has correctly read the question and answer from the transcript.

Sometimes a person to whom the alleged prior statement was made may be a witness at the trial and may be asked whether such statement was in fact made to that person.

[Add if appropriate to the case:

If a witness is asked about a prior statement and you find that prior statement to be inconsistent with the witness's testimony here at the trial, then you may consider that prior inconsistent statement in evaluating the believability and accuracy of the witness's testimony here at the trial. The content, the words, of a prior inconsistent statement may not be used as evidence of what happened on the day in question or of who was involved. It may be used only to evaluate the believability and accuracy of the witness's testimony here at the trial.]

-Photographs

Often a lawyer will ask the court to receive in evidence items, such as a photograph [or a map]. Under our law, to have a photograph [or a map] admitted in evidence, it must be shown that the photograph [or map] is a fair and accurate depiction of the area in question at the time in question.⁴⁴ If that is done, it does not matter on the question of receiving the photograph [or map] in evidence, who took the photograph [or made the map] or when it was done.

Sometimes with a photograph taken a long time after the time in question, a witness will testify that some of the items depicted in the photograph were not present at the scene at the time in question. Unless those items would distort a fair representation of the area at the time in question, the photograph may still be received in evidence with, of course, the understanding that certain items in the photograph were not at that scene at the time in question.

[Sometimes a map or sketch of the area in question will not be drawn to scale. Again, that map or sketch may still be admitted if it is a fair illustration of the area in question, with, of course, the understanding that the objects or distances in the map or sketch are not drawn to scale.]

[Add If Applicable:

In this case, photographs of the deceased may be admitted in evidence to illustrate certain matters. You may, understandably, find the photographs upsetting. If you do, remember you have promised to be fair. If at the end of the case, after you have evaluated all the evidence, you decide that the People have not proven the defendant guilty of a charged crime, then you must find the defendant not guilty. You must not hold the defendant responsible just because you find the photographs upsetting and believe a serious crime took place and you want someone to pay for that crime.]

Lawyers' Questions, Objections, and Conferences

During the presentation of evidence, the lawyers for the parties will, in turn, be asking questions of a witness. During that questioning, a lawyer is not permitted to make comments on a witness's answer or the case. That always happens in TV shows or movies because they have only a short period of time to convey the story. But, in real trials, it is not allowed. In a real trial, it is at the end of the case that the lawyers are permitted to address the jurors in what is called a summation, and it is then that the lawyers may comment on the witnesses, the testimony, and other evidence.

During the questioning of a witness, if a lawyer believes a question or some other presentation of evidence is not in accord with a rule of law, that lawyer will object. When an objection is made, I will decide whether the rules permit the question to be asked or the evidence to be introduced.

Making objections is part of a lawyer's job. You are not to draw any unfavorable inference because objections are made. They take place at every trial.

A lawyer may object before a witness answers a question or after a witness answers a question.

When an objection is made to a question *before* the witness answers, if I *overrule* the objection, the witness will be permitted to answer. If I *sustain* the objection, there is no answer and therefore no evidence. Remember a question alone is not evidence.

If the lawyer objects *after* the witness has answered the question, and I *overrule* the objection, the answer stands as evidence. If I *sustain* the objection, the answer is not evidence, the question and answer are stricken from the record and you are to completely disregard the answer.

[Also, the court has an obligation under the laws of New York to make sure that certain fundamental rules of law are followed even if one of the lawyers does not voice an objection. So, on occasion, you may hear me say sustained or words to that effect, even though one of the lawyers has not objected.]

In any event, any ruling by the court on an objection of counsel or otherwise is based on our law, and expresses no opinion about the facts of the case or whether the defendant is guilty or not guilty. Remember, you are responsible for that decision.

Now, from time to time during the course of the trial there will be conferences at the bench with counsel, and, if they become prolonged, it may be necessary [for the court and the parties to excuse themselves for a short period] [or] [for the court to ask the jury to return to the jury room]. These conferences deal with questions and matters of law or scheduling of the trial that are my responsibility. So when the occasion does arise when there are conferences at the bench or outside your presence, I ask you to be patient and understanding while these conferences are conducted.

Summations

Upon completion of the presentation of evidence, the lawyers will address you in a closing statement or what the law calls a summation. What a lawyer says in summation is not evidence.⁴⁵ The summations, however, provide each lawyer an opportunity to review the evidence presented and submit for your consideration the facts, inferences, and conclusions which they contend may be properly drawn from the evidence presented.⁴⁶

Charge & Deliberation

After summations are concluded, I will instruct you on the rules of law applicable to the case. You must accept and follow those rules. You will then begin your deliberations.

During your deliberations, your function as jurors will be to decide what the facts are and to apply the rules of law that I set out. You will determine what the facts are from all the testimony that you hear, the exhibits that are submitted, and any stipulations the parties have agreed to; or, in other words, you will decide the case on the evidence. The conclusion you reach from determining the facts and applying the law will be your verdict, guilty or not guilty [or not responsible by reason of mental disease or defect].

Fairness Admonition

Remember, you have promised to be a fair juror. A fair juror is a person who will keep their promise to be fair and impartial and who will not permit the verdict to be influenced by a bias or prejudice in favor of or against a person who appeared in this trial on account of that person's race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation, and further, a fair juror must be mindful of any stereotypes or attitudes about people or about groups of people that the juror may have, and must not allow those stereotypes or attitudes to affect their decision.

[As I explained during jury selection,] we all develop and hold unconscious views on many subjects. Some of those unconscious views may come from stereotypes and attitudes about people or about groups of people that may impact on a person's thinking and decision-making without that person even knowing it. As a juror, you are asked to make a very important decision about another member of the community, I know you would not want to make that decision based on such stereotypes or attitudes, that is, on implicit biases, and it would be wrong for you to do so. A fair juror must guard against the impact of such stereotypes or attitudes. You can do this by asking yourself during your deliberations whether your views and conclusions would be different if the defendant, witnesses or others that you have heard about or seen in court were of a different race, color, national origin, ancestry, gender, gender identity or expression, religious practice, age or sexual orientation, or did not have a disability. If the answer is yes, then, in keeping with your promise to be fair, reconsider your views and conclusions along with the other jurors, and make sure your decision is based on the evidence and not on stereotypes or attitudes. Justice requires no less.⁴⁷

Foreperson

Under our law, juror number one will serve as the foreperson. During the trial, the foreperson has the same responsibilities as any other juror. [During deliberations, the foreperson will sign any note that the jury sends to me, including that the jury has reached a verdict.] The foreperson will announce the jury's verdict.

Summary of Trial Stages

Thus in sum, the stages of a criminal trial are ⁴⁸:

1. Openings.
2. The presentation of evidence.
3. Summations.
4. The final instructions of the court to the jury on the law; and
5. The deliberation of the jury and the verdict.

Juror Problem, Trial Delay

During the trial, if you need to speak with me about something relating to your jury service or the trial, please tell a court officer that you need to speak to me. I will then arrange an appropriate meeting with the parties in the courtroom. Do not discuss with your fellow jurors whatever you feel necessary to bring to my attention. And, after we have had our conversation, do not discuss with your fellow jurors whatever it was we discussed.

During a trial, we do our best to avoid delay. From experience I know delays are inevitable for a multitude of reasons, through no one's deliberate fault. When that delay occurs, I ask for your understanding and patience.

Juror Attendance

I also request that you be here at the times I set so the absence or lateness of a juror is not the occasion for delay. [I would ask that you give a phone number to the court officer at which we can reach you if we need to change the trial schedule.]

If an emergency arises that will make you late or prevent you from attending, please call the court, leave a number where you can be reached, and explain the problem so we can minimize everyone's inconvenience. Before you leave, a court officer will give you the telephone number of the court.

Alternate Jurors

An alternate juror is expected to pay the same close attention to the case as any one of the [6][12] jurors. The only difference between an alternate juror and one of the twelve jurors is that the alternate juror does not know at this time whether that juror will be called upon at some point during the trial to substitute for one of the twelve jurors.

For everyone's information, that substitution can take place only if some presently unforeseen, extraordinary emergency arises that makes it totally impossible for one of the first [6][12] jurors to complete the trial. Our law expects that the first [6][12] jurors who begin the trial will be the [6][12]] jurors at the end of the trial. So, it takes an extraordinary emergency before there may be a substitution of an alternate.

Required Jury Admonitions

(Note: Statutory law requires that certain admonitions be given to the jury as part of the court's preliminary instructions. See CPL 270.40. This charge sets forth those admonitions and provides appropriate explanations. It was revised in May 2009 to include admonitions against utilizing electronic means to research or communicate with others about the case).

Our law requires jurors to follow certain instructions in order to help assure a just and fair trial. I will now give you those instructions.

1. Do not converse, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court. But you may not talk with them or anyone else about anything related to the case.
2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial.
3. You must promptly report directly to me any incident within your knowledge involving an attempt by any person improperly to influence you or any member of the jury.
4. Do not visit or view the premises or place where the

charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use internet maps or Google Earth or any other program or device to search for and view any location discussed in the testimony.

5. Do not read, view or listen to any accounts or discussions of the case reported by newspapers, television, radio, the internet, or any other news media.

6. Do not attempt to research any fact, issue, or law related to this case, whether by discussion with others, by research in a library or on the internet, or by any other means or source.

In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, internet chat or chat rooms, blogs, or social websites, such as Facebook, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case, on any device, or internet site, including blogs, chat rooms, social websites or any other means.

You must also not Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge.

Now, ladies and gentlemen, I want you to understand why these rules are so important:

Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else has been so qualified.

Our law also does not permit jurors to converse among themselves about the case until the Court tells them to begin deliberations because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter's view or opinion, or upon information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and our law accordingly sets forth serious consequences if the rules are not followed.

I trust you understand and appreciate the importance of following these rules and, in accord with your oath and promise, I know you will do so.

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1. CPL 300.10 (4)
 2. CPL 260.30 (3)
 3. CPL 260.30 (4)
 4. See *People v Barnes*, 80 NY2d 867, 868 (1992); *People v Davis*, 58 NY2d 1102, 1103-1104 (1983).
 5. CPL 260.30 (5)
 6. See *People v Greaves*, 94 NY2d 775 (1999).
 7. CPL 310.20 (1)
 8. See *People v Boyd*, 58 NY2d 1016, 1018 (1983); *Huff v Bennett*, 6 NY 337 (1852); Richardson, Evidence § 6-214 at 362 (11th ed.).
 9. See *People v Townsley*, 20 NY3d 294 (2012) (“The [prosecutor’s] argument suggested to the jury that there was something improper in a lawyer’s interviewing a witness in the hope of getting favorable testimony. That is not in the least improper. It is what good lawyers do”).
 10. See *People v Liverpool*, 262 AD2d 425, *lv denied* 93 NY2d 1022 (2nd Dept 1999); *People v Fountain*, 170 AD2d 414, 415, *lv denied* 78 NY2d 966 (2nd Dept 1991).
 11. See *Gedders v United States*, 425 US 80, 87 (1976).
 12. CPL 260.30 (6)
 13. *Taylor v Kentucky*, 436 US 478 (1978).
 14. *In re Winship*, 397 US 358 (1970); *Taylor v Kentucky*, *supra*; *People v Antommarchi*, 80 NY2d 247, 252-53 (1992).

15. CPL 300.10 (2)
16. *Id.*
17. *Id.*
19. *In re Winship, supra; People v Antommarchi, supra.*
20. *See People v Whalen, 59 NY2d 273, 279 (1983); People v Beslanovics, 57 NY2d 726 (1982); People v Newman, 46 NY2d 126 (1978).*
21. *Cf. People v Patterson, 39 NY2d 288, 296, affd 432 US 197 (1977)* (stating that, “[i]f the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial...”).
22. *See Taylor v Kentucky, supra; In re Winship, supra; People v Antommarchi, supra.*
23. *See generally, Victor v Nebraska, 511 US 1 (1994); People v Antommarchi, supra; Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt, 78 Tex. L. Rev. 105 (1999); L. Sand, et. al., Modern Federal Jury Instructions, Instruction 4-2, 4-8 to 4-21 (1999); Federal Judicial Center, Pattern Criminal Jury Instructions (1988)* (recommending the following charge: "As I have said many times, the government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty"). Justice Ginsberg, in her concurrence in *Victor v Nebraska, supra*, at 26, stated that "[t]he Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate."
24. *See Victor v Nebraska, supra; In re Winship, supra.*

25. See *Victor v Nebraska*, *supra* at 13 and 17-20 (approving a jury charge that conveyed the concept that "absolute certainty is unattainable in matters relating to human affairs" when the charge said " 'everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt'..." ; and approving that portion of the charge that stated that "a reasonable doubt is 'not a mere possible doubt.'"); *People v Malloy*, 55 NY2d 296, 300, 303 (1982) (approving a charge that included language stating that a reasonable doubt is not "proof beyond ... all doubt or proof to a mathematical certainty, or scientific certainty"); L. Sand, *supra*, at 4-11 to 4-13 (reporting that approved charges in some federal circuits include that proof beyond a reasonable doubt does not mean proof "beyond all possible doubt"); Federal Judicial Center, Pattern Criminal Jury Instructions, *supra* at 17-18 (stating that "... in criminal cases the law does not require proof that overcomes every possible doubt").

26. See Federal Judicial Center, Pattern Criminal Jury Instructions, *supra* at 17-18.

27. See *Solan*, *supra* (stating "...we use the expression 'proof beyond a reasonable doubt' because we believe that the government should be required to prove its case so strongly that the evidence leaves the jury with the highest degree of certitude based on such evidence."); *Victor v Nebraska*, *supra* at 22 (approving a jury instruction that informed the jury that the probabilities must be "strong" enough to prove the defendant's guilt beyond a reasonable doubt).

28. *In re Winship*, *supra*.

29. See *People v Antommarchi*, *supra*; *People v Barker*, 153 NY 111 (1897); *People v Guidici*, 100 NY 503 (1885); *State v Medina*, 147 NJ 43, 69, 685 A2d 1242, 1251 (1996).

30. See *Victor v Nebraska*, 511 US 1, 17 (1994) (accepting a charge that stated that a reasonable doubt is an "actual and substantial doubt...as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture" and separately holding that "A fanciful doubt is not a reasonable doubt."); *People v Guidici*, *supra*; and *People v Jones*, 27 NY2d 222 (1970) (approving a charge that distinguished a reasonable doubt from a "vague and imaginary" doubt).

31. See *People v Cubino* 88 NY2d 998, 1000 (1996); *People v Radcliffe*, 232 NY 249 (1921). *Cubino* approved the following language: "The doubt, to be a reasonable doubt, should be one which a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence or the lack or insufficiency of the evidence in the case." (*Cubino*, 88 NY2d at 1000). The failure, however, to include in that charge that a reasonable doubt may be founded on a "lack of evidence" is not error (*Radcliffe*, 232 NY at 254). Accord, *People v Reinoso*, 257 AD2d 484 (1st Dept 1999), *lv denied* 93 NY2d 901; *Foran v Metz*, 463 FSupp 1088, 1091 (S.D.N.Y), *affd* 603 F2d 212 (2d Cir), *cert denied* 444 U.S. 830 (1979). See *People v. Nazario*, 147 Misc.2d 934 (Supreme Court, Bronx Co., 1990). Compare *People v. Ostin*, 62 A.D.2d 1004 (2nd Dept.1978). In its decision, explaining why the failure to include the "lack of evidence" language was not error, *Radcliffe* explained, "The jurors were instructed that it was their duty to judge the facts and to weigh the evidence and that if they had the slightest doubt of the guilt of the defendants, so long as it was a reasonable doubt, founded on the evidence, it was their duty to acquit. We may assume that they possessed sufficient intelligence to understand that the court intended to tell them that they were to consider not only the evidence that was given in the case but also whether there was an absence of material and *convincing* evidence (*Radcliffe*, 232 NY at 254). This portion of the charge has combined *Cubino's* formulation with a modification from *Radcliffe's* "convincing evidence" language. (Footnote, revised November 1, 2002).

32. Federal Judicial Center, Pattern Criminal Jury Instructions, *supra* at 17-18; L. Sand, Modern Federal Jury Instructions, *supra*, at 4-12 to 4-13 to 4-15 (the terminology "firmly convinced" is used in the Ninth Circuit Pattern Instruction, and the Fifth Circuit and District of Columbia Circuit have approved the Federal Judicial Center charge, that contains such terminology.). States adopting such terminology include New Jersey, Arizona and Indiana. See *State v Medina*, 147 NJ 43, 61 (1996); *State v Portillo*, 182 Ariz 592 (1995); *Winegeart v State*, 665 NE2d 893 (Ind 1996). See also *State v Van Gundy*, 64 Ohio St 3d 230, 232 (1992) (State statutory definition includes: "'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge"). *Solan*, *supra* ("While 'firmly convinced' is not really a definition of 'beyond a reasonable doubt,' it best reflects the idea that defendants should not be convicted unless the government has proven guilt to near certitude"). See also *Jackson v Virginia*, 443 US 307, 315 (1979) ("...by impressing upon the factfinder the need to reach a subjective state of

near certitude of the guilt of the accused, the standard [of proof beyond a reasonable doubt] symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself"); *Victor v Nebraska*, *supra* at 12.

33. See *Solan*, *supra* ("Other possible instructions, such as 'proof so convincing that it leaves no reasonable doubt of the defendant's guilt,' may also accomplish the same goals [of focusing a jury on what they should consider]"). L. Sand, *supra* at 4-12 (reporting that the pattern instructions of the Fifth and Eleventh Circuit include the following language: "It is only required that the government's proof exclude any 'reasonable doubt' concerning the defendant's guilt").

34. See *Victor v Nebraska*, *supra*; *People v Barker*, *supra* (approving a charge which stated, "A reasonable doubt, gentlemen, is not a mere whim, guess or surmise; nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing; but it is such a doubt as reasonable men may entertain, after a careful and honest review and consideration of the evidence in the case").

35. *Id.*

36. *People v Goetz*, *supra*.

37. See *People v Melendez*, 55 NY2d 445, 452 (1982); *People v Laracuente*, 21 AD3d 1389, 1391 (4th Dept 2005), *lv denied* 6 NY3d 777.

38. The trial court has the discretion to permit jurors to submit written questions of a witness subject to appropriate instructions and monitoring by the court (see *People v Knapper*, 230 App Div 487 [1st Dept 1930]; *People v Riley*, 92 AD2d 576 [2d Dept 1983]; *People v Wilds*, 141 AD2d 395 [1st Dept 1988]; *People v Bacic*, 202 AD2d 234 [1st Dept 1994]). One judge has declared that he did not and would not ever exercise his discretion to permit jurors to ask questions of a witness (See *People v Aulder*, 192 Misc2d 404 [Sup Ct 2002]).

39. This charge draws from the Uniform Rules for Juror Deliberation (see 22 NYCRR § 220.10 as amended effective July 20, 2001), and from *People v Hues*, 92 NY2d 413 (1998). The revision was to conform the charge to the amended rules. The Uniform Rules, inter alia, provide:

After the jury has been sworn and before any opening statements or addresses, the court shall determine if the jurors may take notes at any stage of the proceedings. In making this determination, the court shall consider the probable length of the trial and the nature and complexity of the evidence likely to be admitted.
22 NYCRR § 220.10 (b)

Whether to authorize note-taking, and when during the proceedings to authorize it, is in the discretion of the court (*see People v Hues, supra; People v DiLuca*, 85 AD2d 439 [2d Dept 1982]).

However, the trend, encouraged by the court rules and the Court of Appeals, is to permit note-taking (see 22 NYCRR § 220.10(b); *People v Hues, supra*).

If note-taking is permitted, this instruction should be given to the jury at the beginning of the trial and, according to the court rule, the “instructions shall be repeated at the conclusion of the case as part of the court's charge prior to the commencement of jury deliberations.”

If, in the court's discretion, note-taking is *not* permitted, the following charge may be given:

You may not take notes during the trial. There are reasons for that rule.

(1) It is often difficult to take notes and, at the same time, to look at the witness and fully comprehend and appreciate what the witness is saying and how the witness is saying it. Since you are the finders of fact who are responsible for evaluating the believability and accuracy of a witness's testimony, it is important that you be able to both fully comprehend what a witness is saying and how the witness is saying it, without the distraction of taking notes.

(2) There is no real need for notes, since every word of each witness is recorded by the Court Reporter and, during

deliberations, upon your request, the testimony can be read back to you.

The lawyers or the court may take notes. The difference is this. The lawyers and the court are not the finders of the facts. They are not responsible for evaluating the witnesses in order to come to a verdict of guilty or not guilty. The lawyers and the court have other functions for which some note-taking may be helpful. You are not to attach any importance to the lawyers or the court taking or not taking notes. You must decide this case on the evidence and the law.

40. If the court, in its discretion decides to limit note-taking to a particular stage of the trial, or to permit note-taking generally except for a particular stage or stages of the trial, the court can modify the first sentence to state either:

You may, but are not required to, take notes during (specify the portion(s) of the proceedings during which note-taking is permitted).

or

You may, but are not required to, take notes during the proceedings, except you cannot take notes during (specify the portion(s) of the proceedings during which note-taking is prohibited).

41. See generally *People v Ward*, 282 AD2d 819 (3d Dept 2001), *lv denied* 96 NY2d 942; *People v Love*, 244 AD2d 431 (2d Dept 1997), *lv denied* 91 NY2d 876; *People v Turton*, 221 AD2d 671, 671-672 (2d Dept 1995), *lv denied* 88 NY2d 887; *People v Jansen*, 130 AD2d 764 (2d Dept. 1987), *lv denied* 70 NY2d 713.

42. See generally *Tyrrell v Wal-Mart Stores Inc.*, 97 NY2d 650, 652 (2001).

43. See *People v Duncan*, 46 NY2d 74, 80 (1978); *People v Concepcion*, 175 AD2d 324, 327 (3rd Dept 1991), *lv denied* 78 NY2d 1010.

44. See *Moore v Leaseway Transp. Corp.*, 49 NY2d 720, 722 (1980).

45. See *People v Roche*, 98 NY2d 70, 78 (2002).
46. See *People v Galloway*, 54 NY2d 396, 399 (1981).
47. *Implicit bias charge added in June 2019 and revised in June 2021.*
48. See CPL 260.30

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- i. *Id.*
 - ii. *In re Winship, supra ; People v Antommarchi, supra.*
 - iii. See *People v. Whalen*, 59 N.Y.2d 273, 279 (1983); *People v Beslanovics*, 57 N.Y.2d 726 (1982); *People v Newman*, 46 N.Y.2d 126 (1978).
 - iv. Cf. *People v. Patterson*, 39 N.Y.2d 288, 296 (1976), *aff'd*. 432 U.S. 197 (1977) ("If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial...").
 - v. See *Taylor v. Kentucky, supra; In re Winship, supra; People v Antommarchi, supra.*
 - vi. See *People v Goetz*, 73 N.Y.2d 751, 752 (1988).